Supreme Court, U.S.
FILED
JUN 28 2010
OFFICE OF THE CLERK

No. 09-1305

IN THE
Supreme Court of the United States

ZURICH AMERICAN INSURANCE COMPANY, ET AL.,
Petitioners,

v.

PIONEER NATURAL RESOURCES USA, INC. AND
PIONEER NATURAL RESOURCES COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

BARRETT H. REASONER
Counsel of Record
JEFFREY C. KUBIN
ANTHONY N. KAIM
GIBBS & BRUNS, L.L.P.
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805
breasoner@gibbsbruns.com

June 28, 2010

QUESTION PRESENTED

Whether 28 U.S.C. §1447(d) prohibits appellate review of a district court order remanding for lack of subject matter jurisdiction a case removed under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §205.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 6

I. NO CONFLICT EXISTS TO JUSTIFY REVIEW BY THIS COURT 7

A. The Fifth Circuit's Order Does Not Conflict with Any Decision of this Court 7

1. Petitioners' claimed conflict with *Arthur Andersen* has no merit 8

2. The order below does not conflict with *Osborn* 9

3. *Powerex* is fatal to petitioners' argument 11

B. The Fifth Circuit's Order Does Not Conflict with the Decisions of Other Circuits 13

1. There is no conflict with the Ninth Circuit's *Reddam* decision 13

2. Petitioners cite other cases that are irrelevant 15

II. THE DECISIONS BELOW ARE CORRECT AND DO NOT WARRANT REVIEW 17

A. The Fifth Circuit Correctly Concluded that It Lacked Jurisdiction 17

B. The District Court Correctly Concluded that It Lacked Jurisdiction 21

III. THERE IS NO JUSTIFICATION FOR A GRANT, VACATE, AND REMAND ORDER IN THIS CASE 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Amoco Petroleum Additives Co., In re, 964 F.2d 706 (7th Cir. 1992) 16, 19

Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896 (2009) 5, 6, 8, 9, 24

Behrens v. Pelletier, 516 U.S. 299 (1996) 8

Beiser v. Weyler, 284 F.3d 665 (5th Cir. 2002) 3

Briscoe v. Bell, 432 U.S. 404 (1977) 17

Certain Underwriters at Lloyd's London v. Warrantech Corp., 461 F.3d 568 (5th Cir. 2006) 5, 6, 18, 19, 24

City of Waco v. United States Fid. & Guar. Co., 293 U.S. 140 (1934) 6, 9

Dahiya v. Talmidge Int'l, Ltd., 371 F.3d 207 (5th Cir. 2004) 5, 6, 9, 18, 19, 24

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 21

Kircher v. Putnam Funds Trust, 547 U.S. 633 (2006) 7, 9, 17, 19

Kontrick v. Ryan, 540 U.S. 443 (2004) 22

Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999) 16

LaFarge Coppee v. Venezolana De Cementos, S.A.C.A., 31 F.3d 70 (2d Cir. 1994) 16

Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163 (1996) 24, 25

McLaughlin Gormley King Co. v. Terminix Int'l Co., 105 F.3d 1192 (8th Cir. 1997) 16

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 22

Northcross v. Board of Educ., 412 U.S. 427 (1973) 25

Ocean Marine Mut. Protection & Indem. Ass'n, Ltd., In re, 3 F.3d 353 (11th Cir. 1993)..... 17

Osborn v. Haley, 549 U.S. 225 (2007) 5, 6, 10, 11, 12, 13, 18, 24

Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224 (2007) 6, 7, 9, 11, 12, 14, 15, 18, 19, 20, 22

Price v. J & H Marsh & McLennan, Inc., 493 F.3d 55 (2d Cir. 2007)..... 14

Reddam v. KPMG LLP, 457 F.3d 1054 (9th Cir. 2006).....6, 13, 14, 15

Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3d Cir. 2000) 6, 15, 16

Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005) 6, 15, 16

Severonickel v. Gaston Reymenants, 115 F.3d 265 (4th Cir. 1997)..... 16

Taylor v. McKeithen, 407 U.S. 191 (1972) 25

Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 7, 17

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 12

Transit Cas. Co. v. Certain Underwiters at Lloyd's of London, 119 F.3d 619 (8th Cir. 1997) 16, 19

Ultimate Creations, Inc. v. McMahon, 300 F. App'x 528 (9th Cir. 2008) 14

United States v. Rice, 327 U.S. 742 (1946) 12, 19

Youngblood v. West Virginia, 547 U.S. 867 (2006) 25

TREATIES AND STATUTES

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ..... 3, 20

Federal Arbitration Act, 9 U.S.C. §1 *et seq.* 8

9 U.S.C. §16(a)(1) 14

9 U.S.C. §16(a)(1)(A) 8

9 U.S.C. §16(a)(1)(C) 8, 16, 19

Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.* 10

28 U.S.C. §2679(d) 10, 12

28 U.S.C. §2679(d)(1) 10

28 U.S.C. §2679(d)(2) 10

Foreign Sovereign Immunities Act of 1976 11

28 U.S.C. §1441(d) 11

28 U.S.C. §1603 11

9 U.S.C. §202 21

9 U.S.C. §203 ..... 21, 23

9 U.S.C. §205 ..... 3, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23

20 U.S.C. §1617 (1972) (repealed 1978) 25

28 U.S.C. §1291 8

28 U.S.C. §1446 19

28 U.S.C. §1447 19

28 U.S.C. §1447(c) 5, 22

28 U.S.C. §1447(d) 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20

STATEMENT

1. This case is a dispute about insurance coverage for the East Cameron 322 drilling platform ("EC 322") in the Gulf of Mexico. Respondent Pioneer Natural Resources USA, Inc. owned EC 322, and respondent Pioneer Natural Resources Company held insurance policies that provided coverage for damage to EC 322 and resulting liability. One of these policies was Package Insurance Policy No. CR-5591 (the "Package Policy"). Petitioners are underwriters that are responsible to pay claims under the Package Policy. *See* Pet. App. 24a-25a.

The Package Policy applies to the period from June 15, 2005, until June 15, 2006. Section 1 of the Package Policy covers damage to EC 322 and related property. Section 2 covers expenses for bringing related wells under control. Section 3 covers liability expenses to the extent they exceed respondents' coverage under a separate policy issued by Associated Electric & Gas Insurance Services Limited (the "AEGIS Policy"). *See id.* at 25a.

The Package Policy contains multiple dispute resolution provisions. As a whole, the Package Policy is subject to General Insuring Conditions, which by their terms are "APPLICABLE TO ALL SECTIONS OF THIS POLICY." *Id.* at 31a. Paragraph 36(A) of those general conditions provides a process to be followed "[i]n the event it is mutually agreed by [respondents] and [petitioners] to arbitrate any dispute arising under this Policy." *Id.* Paragraph 36(B) provides that

> [i]f any dispute is not resolved through arbitration in accordance with Paragraph [36(A)], it is agreed that in the event of the failure of [petitioners] to pay any amount claimed to be

> due hereunder, [petitioners], at the request of [respondents], will submit to the jurisdiction of a court of competent jurisdiction within the United States of America.

Id. at 32a. Respondents have not agreed to arbitrate their claims in this case under Paragraph 36(A).

Section 3 of the Package Policy also contains a "following form" clause, which provides that, "[s]ubject to the Limit and Excess specified in the Declarations and any paramount exclusions contained in the General Conditions, this Section Three shall follow the terms and conditions" of the AEGIS Policy. *Id.* at 33a. Among those terms and conditions is a mandatory arbitration clause that applies to "[a]ny controversy or dispute arising out of or relating to [the AEGIS Policy], or the breach, termination or validity thereof." *Id.*

2. On September 23, 2005, Hurricane Rita destroyed EC 322 and severely damaged other property covered by the Package Policy. *See* Pet. App. 4a, 25a. Respondents notified petitioners of their losses and later filed a claim under the Package Policy.

Respondents have alleged that petitioners appointed a claims representative, and respondents agreed with the representative about appropriate repairs and remedial work that Pioneer would undertake. *See* Notice of Removal, Exh. B ¶¶ 15-19. Respondents then undertook substantial and costly repairs in reliance on the Package Policy and on that agreement. *See id.* ¶¶ 21-29. Petitioners later took the position that no agreement had been reached and that some of the repairs undertaken were outside the Package Policy's coverage. *See id.* ¶¶ 30, 35, 37.

3. On August 8, 2007, respondents brought an action in Louisiana state court seeking to recover un-

der state law, including (1) under the Package Policy, (2) for breach of contract, (3) for reliance on petitioners' representations, and (4) for breach of petitioners' duties of good faith and fair dealing. *See* Pet. App. 25a-26a. On February 8, 2008, respondents filed an amended petition for damages that stated a claim under Section 3 of the Package Policy. *See id.* at 26a.

On April 18, 2008, petitioners removed the action to the Middle District of Louisiana. The sole basis for federal subject matter jurisdiction stated in the notice of removal was petitioners' allegation that this case involved an "arbitration agreement . . . falling under" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §205. *See* Notice of Removal ¶ 10. In support of that allegation, petitioners claimed that the "following form" provision of Section 3 of the Package Policy incorporated the mandatory arbitration provision of the AEGIS Policy. *See* Pet. App. 5a, 26a. Respondents moved to remand, denying that the Package Policy provided for mandatory arbitration. *See id.* at 5a. The motion was referred to a magistrate judge.

4. On January 6, 2009, the magistrate judge recommended that the district court deny respondents' motion to remand. She reasoned that the AEGIS Policy's mandatory arbitration provision was "an arbitration agreement [that] could conceivably affect the outcome of litigation" and that this sufficed to confer subject matter jurisdiction on the district court. Pet. App. 19a; *see id.* at 10a-11a (discussing *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002)).

The magistrate judge declined to engage in any "construction of the terms of the insurance contracts." *Id.* at 19a. The only question she considered was whether petitioners had made "a reasonable

allegation that [the] arbitration agreement [from the AEGIS Policy] applies to Section Three of the Package Policy through the following form provision." *Id.* at 15a. She cautioned that, because her inquiry was only preliminary, petitioners "m[ight] not ultimately prevail on a subsequent motion to compel arbitration, and they m[ight] one day be returned to state court." *Id.* at 19a.

On February 10, 2009, the district court adopted the magistrate judge's report and recommendation. *Id.* at 22a. Petitioners moved to compel arbitration of the Section 3 claims.

5. On October 7, 2009, the district court remanded the case to state court. The court first applied "ordinary contract principles" under state law to determine whether Section 3's following-form clause incorporated the mandatory arbitration provision from the AEGIS Policy. Pet. App. 31a (internal quotation marks omitted). It reasoned that "[t]he incorporation of a mandatory arbitration clause into the Third Section of an insurance agreement that also contains permissive arbitration and right to sue clauses that are 'APPLICABLE TO ALL SECTIONS OF THIS POLICY,' creates ambiguity" in the Package Policy. *Id.* at 35a. Because the Package Policy is an insurance policy, it then "construed [the policy] in favor of the insured," *i.e.*, respondents, and as a result concluded that "no valid agreement exists between the parties to submit the disputes to arbitration." *Id.* at 36a.

The district court then considered the effect of this conclusion on its jurisdiction. It noted that its previous ruling, in the form of the magistrate judge's adopted report and recommendation, had not been "based on an evaluation of the merits or contract

interpretation." *Id.* Its consideration of the motion to compel, however, had "require[d] the court . . . to engage in contract interpretation." *Id.* Having done so, and having concluded that "the Package Policy does not present a valid agreement to arbitrate," the court concluded that "the Convention is not applicable to the dispute before the court and federal question jurisdiction is, therefore, absent." *Id.* at 36a-37a.

Quoting 28 U.S.C. §1447(c)'s directive that "'[i]f at any time before final judgment, it appears that the district court lacks subject matter jurisdiction, the case shall be remanded,'" the district court then remanded the case. *Id.* at 37a (alteration in original). It did not rule on petitioners' motion to compel.

6. On October 27, 2009, petitioners filed a notice of appeal, which stated their intent to "appeal . . . from the [district court's] Order . . . remanding this action" to state court. Notice of Appeal at 1. Respondents moved to dismiss the appeal for lack of appellate jurisdiction. On December 17, 2009, the court of appeals issued a one-sentence unpublished, per curiam order dismissing the appeal for lack of jurisdiction. *See* Pet. App. 1a-2a. Petitioners then sought rehearing en banc, which the court of appeals denied. *See id.* at 39a-40a.

In their motion before the court of appeals, respondents relied on *Dahiya v. Talmidge International, Ltd.*, 371 F.3d 207 (5th Cir. 2004), and *Certain Underwriters at Lloyd's London v. Warrantech Corp.*, 461 F.3d 568 (5th Cir. 2006). *See* Appellees' Mot. To Dismiss at 3-8. Petitioners did not suggest in response that *Dahiya* or *Warrantech* was inconsistent with *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009), or *Osborn v. Haley*, 549 U.S. 225 (2007).

Indeed, petitioners did not even cite those cases to the court of appeals. Petitioners also never called the attention of the court of appeals to *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), or any of the other decisions they now claim conflict with *Dahiya* and *Warrantech*.[1] They argued instead that *Dahiya* and *Warrantech* were distinguishable, inconsistent with the Fifth Circuit's own precedent, or inconsistent with *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), which is not mentioned in the petition. *See* Appellants' Opp. to Mot. To Dismiss at 5-8 & n.10; Appellants' Pet. for Reh'g En Banc at v-vi n.3, 1-2.

REASONS FOR DENYING THE PETITION

Petitioners have failed to show that this case warrants review by this Court. There is no conflict between the one-sentence unpublished, per curiam order of the court of appeals and this Court's decisions in *Arthur Andersen* or *Osborn*. That is particularly true in light of this Court's decision in *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224 (2007), which rejected arguments very similar to those that petitioners advance here. No conflict exists between the court of appeals' judgment and any decision of any other circuit. The cases on which petitioners rely are easily distinguishable and, in the case of the Ninth Circuit's decision in *Reddam*, no longer good law in light of intervening Supreme Court precedent.

Petitioners also have failed to show that either the court of appeals or the district court erred in this case or that their decisions otherwise warrant review.

---

[1] *See* Pet. 20-22 (citing *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005), and *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000)).

The Fifth Circuit's ruling that it lacked appellate jurisdiction was correct in light of *Powerex* and this Court's cases holding that 28 U.S.C. §1447(d) bars appellate review of a remand for lack of subject matter jurisdiction. The district court's conclusion that it lacked subject matter jurisdiction was also correct, although this Court likely would not reach that question even if it granted review.

Finally, a grant, vacate, and remand ("GVR") order is not warranted in this case. The summary disposition of this matter by the Fifth Circuit was entirely appropriate, especially given that petitioners themselves failed to cite to that court the cases they say it should have followed, and no intervening developments warrant vacatur and remand.

I. NO CONFLICT EXISTS TO JUSTIFY REVIEW BY THIS COURT

A. The Fifth Circuit's Order Does Not Conflict with Any Decision of this Court

The Fifth Circuit's order dismissing petitioners' appeal is consistent with (indeed, was compelled by) this Court's "relentlessly repeated" instruction that "'any remand order issued on the grounds specified in §1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court.'" *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (quoting *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976)) (alteration in *Kircher*). Nothing in the cases on which petitioners rely undermines the application of that rule to this case.

1. Petitioners' claimed conflict with Arthur Andersen *has no merit.*

The Fifth Circuit's judgment does not conflict with *Arthur Andersen*. *See* Pet. 12-14. *Arthur Andersen* involved 9 U.S.C. §16(a)(1)(A), which permits immediate appeal from "an order . . . refusing a stay of any action under [9 U.S.C. §] 3," which is part of the Federal Arbitration Act. Section 16(a)(1)(A) is an exception to the rule that only final judgments of the district courts are appealable under 28 U.S.C. §1291. *See* 129 S. Ct. at 1900. The question presented in *Arthur Andersen* was whether this exception applied to "denials of stays requested by litigants who were not parties to the relevant arbitration agreement." *Id.* at 1899. The Court held that it did, criticizing contrary appellate precedent for "conflating the jurisdictional question with the merits of the appeal." *Id.* at 1900. It cautioned that "[j]urisdiction over the appeal . . . 'must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order.'" *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996)).

Arthur Andersen did not involve a remand order. The Court had no occasion to, and did not, consider whether §16(a)(1)(A) (or §16(a)(1)(C), on which petitioners rely) affects the application of §1447(d) to a remand in a case that involves an alleged arbitration agreement. The Fifth Circuit's order therefore does not conflict with *Arthur Andersen*.

Arthur Andersen's reasoning is also fully consistent with (indeed, positively supports) the court of appeals' conclusion that §1447(d) bars appellate review here. In this case, the "category of order appealed from," 129 S. Ct. at 1900, is a remand for lack of sub-

ject matter jurisdiction. That kind of order may not be appealed under §1447(d). Petitioners did not appeal an order denying their motion to compel because the district court did not issue one. On the contrary, their own notice of appeal referred only to the district court's order "remanding this action." *See* p. 5, *supra*.

Petitioners repeatedly assert that the district court *did* deny their motion to compel, relying on a statement in the Fifth Circuit's *Dahiya* decision that "[a]ny order remanding for lack of subject matter jurisdiction necessarily denies all other pending motions." 371 F.3d at 210; *see* Pet. 11, 12, 14, 19, 24. It is true that if the district court lacked subject matter jurisdiction it could not compel arbitration. That is all that the Fifth Circuit said in *Dahiya*. *See* 371 F.3d at 210 ("[U]nless a federal court possesses subject matter jurisdiction over a dispute, any order it makes (other than an order of dismissal or remand) is void.") (internal quotation marks and alterations omitted). That truism does not make a remand order anything but a remand order and does not make such an order reviewable under §1447(d).[2]

2. The order below does not conflict with Osborn.

Recognizing (as they must) that *Arthur Andersen* did not involve a remand or §1447(d), petitioners also

---

[2] Both *Kircher* and *Powerex* rejected arguments that §1447(d) permits review of a merits-related determination that "cannot be disaggregated" from a remand order. *Kircher*, 547 U.S. at 645-46 n.13; *see Powerex*, 551 U.S. at 235-36 (following *Kircher*). In doing so, both cases also distinguished *City of Waco*, 293 U.S. 140, on which petitioners relied before the court of appeals but do not rely in their petition. *See Powerex*, 551 U.S. at 236 ("As we reiterated in *Kircher*, *Waco* does not permit an appeal when there is no *order* separate from the unreviewable remand order.") (citation omitted); *see also* p. 6, *supra*.

assert that the court of appeals' order conflicts with *Osborn*. *See* Pet. 14-19. That claim also fails.

Osborn involved 28 U.S.C. §2679(d), the provision of the Federal Tort Claims Act ("FTCA") that authorizes the Attorney General to remove to federal court a suit raising a tort claim against a federal employee after certifying that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. §2679(d)(1). Such a "certification . . . conclusively establish[es] scope of office or employment for purposes of removal." *Id.* §2679(d)(2).

In *Osborn*, this Court considered the interaction between §1447(d) and §2679(d)(2). It determined that §2679(d)(2) was an "antishuttling provision[]" by which "Congress ha[d] barred a district court from passing the case back to the state court where it originated" and that because of that categorical bar appellate review of a remand was appropriate despite §1447(d). 549 U.S. at 243-44. The Court cautioned, however, that its

> decision that §2679(d)(2) leaves the district court without authority to send a certified case back to the state court scarcely means that whenever the district court misconstrues a jurisdictional statute, appellate review of the remand is in order. Such an exception would, of course, collide head on with §1447(d), and with our precedent. Only in the extraordinary case in which Congress has ordered the inter-court shuttle to travel just one way – from state to federal court – does today's decision hold sway.

Id. (citation omitted).

Nothing in 9 U.S.C. §205, the removal statute that petitioners have invoked, makes this a similarly "extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way." *Id.* On the contrary, §205 itself directs (with an exception not relevant here) that "[t]he procedure for removal of causes otherwise provided by law shall apply" to cases removed under that section. Accordingly, *Osborn*'s narrow holding based on the language of a different statutory provision does not conflict with the Fifth Circuit's order.

3. Powerex *is fatal to petitioners' argument.*

This Court confirmed the narrowness of *Osborn*'s holding in *Powerex*, which was issued a few months after *Osborn*. Petitioners cite *Powerex* only in a footnote and quote only the dissent. *See* Pet. 17 n.6. The majority opinion, however, conclusively defeats petitioners' claim of a conflict with *Osborn*.

Powerex involved a removal by an entity that claimed "foreign state" status under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§1441(d), 1603. The district court had held that Powerex, a subsidiary of a state-owned hydropower company, was not a foreign state; and, concluding that this deprived it of subject matter jurisdiction, had remanded the case to state court. *See* 551 U.S. at 227-28, 232-33. Powerex sought appellate review and argued (like petitioners here) that the importance of FSIA immunity to foreign relations was such that "Congress could not have intended to grant district judges irrevocable authority to decide questions with such sensitive foreign-relations implications." *Id.* at 236 (internal quotation marks omitted).

The *Powerex* Court firmly rejected that argument. Describing §1447(d) as a "clear jurisdictional stat-

ute," the Court reasoned that an equally clear exception to §1447(d) would be required to make a particular class of remand orders reviewable on appeal. *Id.* at 237. The Court therefore reaffirmed "longstanding precedent" that a "'clear statutory command'" is required when Congress seeks to depart in a particular context from the "'"universal[] . . . practice" of denying appellate review of remand orders.'" *Id.* (quoting *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995), in turn quoting *United States v. Rice*, 327 U.S. 742, 752 (1946)).

The *Powerex* Court discussed *Osborn* in two long footnotes. One explained that *Osborn* "had nothing to say about the scope of review that is permissible under §1447(d), since it held that §1447(d) was displaced in its entirety by 28 U.S.C. §2679(d)(2)." *Id.* at 233 n.2. The other, responding to an argument made in the dissent, explained that the key to *Osborn*'s holding was its "repeated[] emphas[is] that [§2679(d)] certification is '"conclusiv[e] . . . *for purposes of removal*."'" *Id.* at 238 n.5 (quoting *Osborn*, 549 U.S. at 242, 243, in turn quoting 28 U.S.C. §2679(d); fourth alteration, omission, and emphasis added in *Powerex*). *Powerex* therefore rejected a reading of *Osborn* that would "license . . . courts to assume the legislative role" by making exceptions to "§1447(d)'s bar on appellate review" without a textual mandate. *Id.* Notably, Justice Ginsburg, who wrote *Osborn*, joined *Powerex* in full.

Petitioners' studied avoidance of *Powerex* is telling: *Osborn* on its face fails to support their claim of a conflict with the court of appeals' order, but the gloss given to *Osborn* by *Powerex* disposes of that claim completely. Petitioners cannot credibly contend that the removal provision at issue here "displace[s]

[§1447(d)] in its entirety," *id.* at 233 n.2, in light of its express incorporation of "[t]he procedure for removal of causes otherwise provided by law," 9 U.S.C. §205. Their attempt to establish a conflict between the Fifth Circuit's order and a decision of this Court therefore fails.

B. The Fifth Circuit's Order Does Not Conflict with the Decisions of Other Circuits

1. There is no conflict with the Ninth Circuit's Reddam *decision.*

Petitioners claim that the order below conflicts with the Ninth Circuit's decision in *Reddam*. *Reddam* is distinguishable and inconsistent with this Court's intervening precedent. In any event, it does not provide a basis on which to grant certiorari.

In *Reddam*, the Ninth Circuit reviewed a district court's decision to remand a case removed under §205 after the chosen arbitrator (the National Association of Securities Dealers) declined to arbitrate. *See* 457 F.3d at 1057. The *Reddam* court held that, "[w]here [a] remand order is not based on defective removal or lack of subject matter jurisdiction *at the time of removal*, §1447(c) does not apply and the §1447(d) restriction [on appellate review] does not apply either." *Id.* at 1058 (emphasis added, footnote omitted). It relied on a line of cases holding that events occurring after the time of removal "cannot be the basis for a §1447(c) remand order." *Id.* at 1059.

The district court's remand order in this case did not rely on events occurring after the time of removal. Instead, the court relied exclusively on the contents of insurance policies signed years before removal. *See* Pet. App. 31a-37a. *Reddam* thus does not suggest that the Ninth Circuit would have reached a different result on the present facts.

In addition, *Powerex* considered and rejected the proposition that "a remand for lack of subject-matter jurisdiction is not covered [by §1447(c)] so long as the case was properly removed in the first instance," "hold[ing]" instead that, "when a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by §1447(c) and thus shielded from review by §1447(d)." 551 U.S. at 230, 232. That holding is contrary to *Reddam*. *See Price v. J & H Marsh & McLennan, Inc.*, 493 F.3d 55, 60-61 (2d Cir. 2007) (listing *Reddam* among cases applying the so-called "post-removal-event" doctrine that was rejected by this Court in *Powerex*). It is likely that, if and when the Ninth Circuit again has occasion to consider *Reddam*, it will revisit that case without further guidance from this Court.[3]

Petitioners rely upon a footnote in *Reddam* that reads, in its entirety: "Beyond that, we have jurisdiction under 9 U.S.C. §16(a)(1)(A) & (B) to review the district court's conclusion that it could no longer enforce the arbitration agreement." 457 F.3d at 1059 n.8. That conclusory footnote is more dictum than holding and does not even cite §1447(d). It does not establish that the Ninth Circuit has adopted a rule that §16(a)(1) displaces §1447(d) in cases that do not involve a district court's reliance on post-removal events. When the Ninth Circuit ultimately reconsiders *Reddam* in light of *Powerex*, it likely will not

---

[3] Since *Powerex*, the Ninth Circuit has applied *Reddam* once in an unpublished memorandum affirmance that did not involve an arbitration agreement. *See Ultimate Creations, Inc. v. McMahon*, 300 F. App'x 528, 529 (9th Cir. 2008). *Ultimate Creations* is nonprecedential and does not suggest that the Ninth Circuit will not follow *Powerex* when better advised.

interpret *Reddam*'s footnote as an exception to §1447(d), or it will reconsider that footnote along with the rest of *Reddam*'s holding. It would be premature for this Court to grant review before seeing whether the Ninth Circuit will appropriately apply *Powerex*'s emphasis on the need for a "clear statutory command" to bypass §1447(d). 551 U.S. at 237 (internal quotation marks omitted).

2. Petitioners cite other cases that are irrelevant.

The remaining cases that petitioners allege conflict with the Fifth Circuit's order below have nothing to do with the question presented. None involved review of a remand to state court, and thus none interpreted or applied §1447(d).[4]

In *Sarhank Group*, *cited in* Pet. 20-21, the Second Circuit reviewed a district court's grant of a petition to enforce an award by an Egyptian arbitration tribunal. *See* 404 F.3d at 658-59. The district court had found that it had subject matter jurisdiction, and the Second Circuit agreed. *See id.* at 659-60. There was no remand, and the Second Circuit never cited §1447(d).

In *Sandvik AB*, *cited in* Pet. 21, the Third Circuit reviewed a district court's order denying a motion to compel arbitration. *See* 220 F.3d at 102. In denying

---

[4] *See* Pet. i (presenting the question whether "an order denying a motion to compel arbitration and remanding to state court is appealable under the Federal Arbitration Act's express right of interlocutory appeal from such denials, 9 U.S.C. §16(a)(1)(C), notwithstanding 28 U.S.C. §1447(d)"). Respondents do not concede that this case actually involves "an order denying a motion to compel arbitration," because the district court entered no such order. *See* p. 5, *supra*. Even as petitioners have formulated the question, however, cases that do not involve an order "remanding to state court" are not within its scope.

that motion, the district court had retained jurisdiction to conduct further proceedings in order to "determin[e] . . . whether there was an actual agreement to arbitrate." *Id.* The Third Circuit held that §16(a)(1)(C) gave it jurisdiction to review the district court's interlocutory denial of the motion to compel. *See id.* at 102-04. There was no remand, and the Third Circuit never cited §1447(d).[5]

The same is not true, however, of the Fourth and Eighth Circuit cases that petitioners concede support the Fifth Circuit's decision in this case. *See* Pet. 20 (citing *Severonickel v. Gaston Reymenants*, 115 F.3d 265, 267 (4th Cir. 1997), and *Transit Casualty Co. v. Certain Underwiters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997)). Those cases *did* involve district court remand orders based on a lack of subject matter jurisdiction under 9 U.S.C. §205 and *did* hold that appellate review was barred by §1447(d). *See Severonickel*, 115 F.3d at 266-69; *Transit Cas.*, 119 F.3d at 623-25.

The Second, Seventh, and Eleventh Circuits have reached similar results in cases removed under §205 but remanded based on procedural defects. *See La-Farge Coppee v. Venezolana De Cementos, S.A.C.A.*, 31 F.3d 70, 72 (2d Cir. 1994) ("[T]he remand was ordered on grounds covered by subsection 1447(c), and appellate jurisdiction is therefore unavailable under subsection 1447(d)."); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir. 1992) (holding that §205 "incorporates" §1447(d)'s bar on appellate

---

[5] Petitioners also cite in a footnote *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), and *McLaughlin Gormley King Co. v. Terminix International Co.*, 105 F.3d 1192 (8th Cir. 1997). As with *Sarhank* and *Sandvik AB*, neither of those cases involved a remand to state court.

review); *In re Ocean Marine Mut. Protection & Indem. Ass'n, Ltd.*, 3 F.3d 353, 355 (11th Cir. 1993) ("[A] remand order based on a timely §1447(c) motion to remand for defects in removal procedure is unreviewable pursuant to §1447(d)."). Although not directly on point, those cases support the Fifth Circuit's conclusion that §1447(d) does apply in cases removed under §205.

In sum, with regard to the question presented for this Court's review – whether, in a case removed under §205, §1447(d) bars appellate review of a district court's remand order that is based on a lack of subject matter jurisdiction – there is consensus, not conflict, among the courts of appeals.

II. THE DECISIONS BELOW ARE CORRECT AND DO NOT WARRANT REVIEW

A. The Fifth Circuit Correctly Concluded that It Lacked Jurisdiction

The court of appeals rightly determined that it lacked jurisdiction over petitioners' appeal. Section 1447(d) directs that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with the exception of certain civil rights cases. This broad bar on review has been narrowed by judicial interpretation, *see Thermtron Prods.*, 423 U.S. at 345-46, but nevertheless still applies to remands based on lack of subject matter jurisdiction. It is well-established that, where §1447(d) applies, "'review is unavailable no matter how plain the legal error in ordering the remand.'" *Kircher*, 547 U.S. at 642 (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14 n.13 (1977)).

The district court's opinion shows (and petitioners do not appear to dispute) that the court *characterized* its order as a remand for lack of subject matter juris-

diction. *See* Pet. App. 36a-37a.[6] Under *Powerex*, appellate "review of [a d]istrict [c]ourt's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable." 551 U.S. at 234. The question whether the district court *correctly* determined that it lacked subject matter jurisdiction was not before the Fifth Circuit and would not be before this Court even if certiorari was granted. In any event, the district court's conclusion was more than merely colorable. *See* pp. 21-23, *infra*.

The court of appeals' reasoning in reaching these conclusions is well set forth in its earlier *Dahiya* and *Warrantech* decisions, in terms that apply equally to this case.[7] Those decisions also correctly concluded that the applicability of §1447(d)'s bar on appellate review is reinforced in cases removed under 9 U.S.C. §205 by Congress's instruction that "[t]he procedure for removal of causes otherwise provided by law shall

---

[6] Two sitting Justices have taken the position that a "conclusion that the District Court purported to remand for lack of subject-matter jurisdiction is alone enough to bar review under §1447(d)." *Powerex*, 551 U.S. at 233 (citing *Osborn*, 549 U.S. at 264 (Scalia, J., joined by Thomas, J., dissenting)). That view would make it even clearer that the Fifth Circuit lacked jurisdiction here.

[7] *See Dahiya*, 371 F.3d at 209 ("The district court appears to have concluded that it lacked subject matter jurisdiction and to have remanded on that basis. Thus, under §1447(d), we cannot review the remand."); *Warrantech*, 461 F.3d at 573 ("Section 1447(d) precludes examination of the *merits* of the district court's actions; we only must determine what the district court *perceived* it was doing, as no matter how erroneous, a remand order based on a §1447(c) ground precludes review on appeal.") (footnote and internal quotation marks omitted).

apply." *See Dahiya*, 371 F.3d at 209; *Warrantech*, 461 F.3d at 576; *accord Transit Cas.*, 119 F.3d at 625 (likewise relying on this language); *Amoco Petroleum*, 964 F.2d at 712 (same).[8]

Petitioners object that, if the district court had denied their motion to compel but not immediately remanded, its denial would have been appealable under 9 U.S.C. §16(a)(1)(C) and that "there is no logical or jurisprudential rationale for allowing appeals of such [denials] whenever they precede remand orders, but denying appeals of the same rulings when the District Court elects to issue a simultaneous remand." Pet. 24.[9] On the contrary, there is the best possible reason for treating the two kinds of orders differently: Congress has authorized (via §16(a)(1)(C)) an appeal from the denial of a motion to compel, but has prohibited (via §1447(d)) an appeal from the grant of a motion to remand.

Congress itself also had an excellent reason for the prohibition of §1447(d): that section embodies a longstanding "policy . . . oppos[ing] 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Kircher*, 547 U.S. at 640 (quoting *Rice*, 327 U.S. at 751); *see also Powerex*, 551 U.S. at 238-39. The policy

---

[8] Petitioners assert in a footnote that this language from 9 U.S.C. §205 refers only to 28 U.S.C. §1446, and not to §1447. On the contrary, the phrase "procedure for removal of causes otherwise provided by law" easily encompasses §1447(d), as every court to consider the question has concluded.

[9] Petitioners are also wrong that this case involves the "same ruling[]" that would be appealable under §16(a)(1)(C). The district court never denied petitioners' motion to compel. *See* p. 5, *supra*.

question before Congress when it enacted §205 was not whether arbitration agreements are important, *see* Pet. 24-31, but whether those agreements are important *enough* to justify an exception to §1447(d)'s general prohibition against review of remands. If Congress had thought they were, it would have said so. *See Powerex*, 551 U.S. at 237 ("Congress has repeatedly demonstrated its readiness to exempt particular classes of remand orders from §1447(d) when it wishes.").

Petitioners' arguments that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is itself so important that appellate review should be available to enforce "the treaty obligation of the United States," Pet. 24, is very similar to the arguments rejected in *Powerex*. As two Justices observed in that case, Congress "no doubt considered [the FSIA] . . . to be of importance for maintaining a proper relationship with other nations," and there was some reason to believe that denying appellate review of determinations under the FSIA "might well frustrate a policy of importance to [the federal] Government." 551 U.S. at 239 (Kennedy, J., concurring). Those weighty policy considerations, however, could not overcome "the structure and wording of §1447(d)." *Id.* The structure and wording of §1447(d) remain unchanged, notwithstanding *Powerex*, as does the absence of any exception to §1447(d). The policy considerations that favor enforcing arbitration agreements are no weightier (and no less committed to Congress) than those that urge respect for foreign sovereigns. *Powerex* thus forecloses petitioners' arguments and supports the Fifth Circuit's conclusion that it lacked jurisdiction.

B. The District Court Correctly Concluded that It Lacked Jurisdiction

Petitioners fall short of showing even that the district court *erred* in its jurisdictional determination, much less showing that it lacked a colorable basis for that determination. Section 203 provides federal subject matter jurisdiction only over an "action or proceeding falling under the Convention," 9 U.S.C. §203, and only an "arbitration agreement or arbitral award" can "fall[] under the Convention," *id.* §202. Similarly, §205 authorizes removal only of an "action . . . [that] relates to an arbitration agreement or award falling under the Convention." Accordingly, when the district court had determined as a matter of state contract law that the parties had not reached any mandatory arbitration agreement at all,[10] it lacked jurisdiction to go further under the plain language of the statute.

The district court also correctly concluded that, after construing the contract, it could revisit its preliminary ruling that it had jurisdiction – as, indeed,

---

[10] That determination was itself correct under the language of the parties' agreement and under applicable principles of state law. *See* Pet. App. 31a-37a. It is also a plainly insufficient ground for review by this Court, and petitioners do not seek review of that question. Further, although petitioners suggest in passing that the district court erred by applying state rather than federal law to determine whether the parties had agreed to arbitrate their dispute, *see* Pet. 28-29, they do not seek review of that question either. The district court was in any event correct. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (explaining with exceptions not relevant here that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts").

it had earlier signaled. *See* Pet. App. 17a, 19a, 27a. Section 1447(c) expressly permits a remand for lack of subject matter jurisdiction "at any time before final judgment." That is consistent with the rule that a lack of subject matter jurisdiction in the district court may be raised "at any time in the same civil action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). It is also consistent with the rule that "every order short of a final decree is subject to reopening at the discretion of the district judge." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983). There is no sign that Congress intended to depart from these settled procedural principles in enacting §205.

Petitioners argue that, in enacting §205, "Congress intended for the district courts to make a quick and conclusive assessment of their jurisdiction on the pleadings alone" and that "a district court's determination that a case relates to an arbitration agreement under Section 205 is conclusive of the jurisdictional inquiry." Pet. 16, 17. Although petitioners describe this purported congressional intent with great vigor, they identify no textual basis for that theory and no persuasive inference drawn from any other tool of statutory construction. They simply assert that Congress meant a district court's first look at jurisdiction to be conclusive as though that were enough to make it so. This Court's refusal in *Powerex* to "ignore a clear jurisdictional statute in reliance upon supposition of what Congress *really* wanted," 551 U.S. at 237, applies with equal force to petitioners' arguments here.

Petitioners further argue that Congress showed its intent to provide for "easy removal" in §205 cases by

describing the required relationship between an arbitration agreement and a case to be removed using the broad phrase "relates to." Pet. 16 (internal quotation marks omitted). However broad the phrase "relates to" may be, it does not establish or imply that Congress meant a district court's first determination about whether a case relates to an arbitration agreement to bind that court for the rest of the case. Further, on the facts of this case, the breadth of the phrase "relates to" is irrelevant. The key question before the district court was whether the parties had agreed to arbitrate by incorporating a mandatory arbitration clause into their contract. When it concluded they had not, there was no agreement falling under the Convention in the case and no basis for jurisdiction under either §203 or §205.

In sum, the district court's conclusion that it lacked subject matter jurisdiction was correct, and petitioners have offered no persuasive reason to doubt it. They have certainly fallen short of showing that it lacked a colorable basis. For that latter reason, this case would be a poor vehicle for examining the construction of §205. If after granting review the Court determined (as it likely would) that the district court's ruling was colorably characterized as a remand for lack of subject matter jurisdiction, it would have no occasion to interpret §205 itself.

III. THERE IS NO JUSTIFICATION FOR A GRANT, VACATE, AND REMAND ORDER IN THIS CASE

Petitioners seek the alternative relief of an order granting certiorari, vacating the order of the court of appeals, and remanding to "require the Fifth Circuit to explain its actions." Pet. 33. There is no reason for such an order in this case.

In *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam), this Court set forth the standard to be applied when considering whether to grant certiorari and then summarily vacate and remand ("GVR"):

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Id. at 167. Petitioners allege no intervening developments that meet that standard and do not claim that it is met. Nor could they. *Osborn* was decided in 2007, and *Arthur Andersen* in May 2009, well in advance of the Fifth Circuit's order and of petitioners' briefing to that court.

Petitioners fault the Fifth Circuit for not explaining its reasoning when it dismissed their appeal. That summary disposition, however, is easily explained. In opposing respondents' motion to dismiss for lack of appellate jurisdiction, petitioners did not cite *Osborn*, did not cite *Arthur Andersen*, and did not urge the court of appeals to reconsider either *Dahiya* or *Warrantech* as conflicting with any decision of this Court. *See* pp. 5-6, *supra*. Instead, they claimed implausibly that both *Dahiya* and *Warrantech* could be distinguished on their facts. *See id.* at 6. Faced with that argument, the court of appeals no doubt reasonably concluded that an opinion merely applying *Dahiya* and *Warrantech* would have no precedential signific-

ance and that it was unnecessary to write one. The "equities of the case," *Lawrence*, 516 U.S. at 167-68, do not favor this Court's intervention to permit petitioners to reargue this case before the court of appeals with new arguments and authorities not presented during its first stop in that court.

The cases that petitioners cite in which this Court has issued GVR orders to require a lower court to clarify the basis for its reasoning, *see* Pet. 32-33, were rare exceptions to the general principles set forth by *Lawrence*.[11] Nothing about this case should prompt this Court to exercise its discretion similarly here. Petitioners have failed to establish that this case involves any issue that warrants this Court's review and indeed have failed even to cast doubt on the correctness of the Fifth Circuit's order.

CONCLUSION

The petition for a writ of certiorari should be denied.

---

[11] *See Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (per curiam) (vacating and remanding for further consideration of a *Brady* claim that had been "clearly presented" to the state supreme court and that raised a "significan[t] . . . issue" about the validity of a criminal conviction for a serious offense); *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (in a voting rights case, vacating and remanding for an explanation of a court of appeals' decision "summarily revers[ing] without any opinion on a point that had been considered at length by the District Judge"). *Northcross v. Board of Education*, 412 U.S. 427 (1973) (per curiam), the third case cited by petitioners, clarified the statutory standard to be applied on remand to a request for attorneys' fees before vacating the order of the court of appeals and is therefore more accurately described as a summary merits disposition than a GVR as the Court now uses the term. *See id.* at 428-29 (construing 20 U.S.C. §1617 (1972) (repealed 1978)).

Respectfully submitted,

BARRETT H. REASONER
Counsel of Record
JEFFREY C. KUBIN
ANTHONY N. KAIM
GIBBS & BRUNS, L.L.P.
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805
breasoner@gibbsbruns.com

June 28, 2010